

**VOLUME NO. 36****Opinion No. 115**

**COUNTY ATTORNEYS — Vacancy, Term of appointment; Private practice. Extent of; Section 5, Chapter 102, Laws of 1975, Section 16-3106, Revised Codes of Montana 1947.**

**HELD: The appointed or elected successor to a county attorney who chose, under Section 5, Chapter 102, Laws of 1975, to serve as a part-time county attorney, and who resigned before completing his term, may complete that term on a part-time basis.**

December 28, 1976

Mr. Charles Graveley  
Deputy County Attorney  
Courthouse  
Helena, MT 59601

Dear Mr. Graveley:

You have requested my opinion on the following question: May the appointed or elected successor to a county attorney who chose, under Section 5, Chapter 102, Laws of 1975, to serve as a part-time county attorney, and who resigned before completing his term, complete that term on a part-time basis?

Section 1, Chapter 102, Laws of 1975, now codified at Section 16-3106, R.C.M. 1947, provides that in counties with a population in excess of thirty thousand (30,000) the county attorney is prohibited from engaging in the private practice of law — i.e., that he must be a full time county attorney. Section 3 of Chapter 102, codified at Section 25-605, provides that those county attorneys are to receive a salary of \$25,000. However, Section 5 provides as follows:

The effective date of this act is July 1, 1975, provided that any county attorney now serving in a county with a population in excess of thirty thousand (30,000) may elect to complete his present term of office at the salary as presently set by law and retain the right to engage in the private practice of law.

The salary to which Section 5 referred to was \$16,000, as set by Section 25-605 as it then read. Your question is therefore whether the language of Section 5 allows the county attorney's successor to serve on a part-time basis at the reduced salary for the remainder of the vacant term that he fills.

When the duration of an officer's term is set, but there are no fixed commencement or termination dates, the courts declare a vacancy created by the officer's resignation, death, or removal to be a vacancy "in the office". **Anderson v. Phillips**, 119 Cal. Rptr. 879, 532 P.2d 1247 (1975). A vacancy in an office for which there are fixed commencement and termination dates is said to be a vacancy "in the term". **Anderson, supra**. Because a county attorney's term of office has a fixed beginning and termination date, a vacancy created by the resignation of a county attorney is a vacancy in the term.

When a vacancy in a term occurs, the successor fills the vacancy only until the termination date of the predecessor's term. 63 Am. Jur. 2d, Public Officers and Employees, Section 155. The rationale is that the term of office is to be considered as separate and distinct entity, **Thruston v. Clark**, 107 Cal. Rptr. 285, 40 P. 435 (1895), and "[t]he resignation or the removal of an officer during his term and the election or appointment of a successor does not divide the term nor create a new and distinct one". **State v. Rose**, 74 Kan. 262, 86 P. 296, 298 (1906). Thus, the successor to a county attorney who has resigned from office, whether he be appointed or elected to fill the vacancy, merely completes the former county attorney's term. See 36 **Opinions of the Attorney General**, No. 107 (1976). In the example you have given, the county attorney who resigned had elected to make his term of office that of a part-time county attorney. His successor, who merely completes his term, may therefore also serve as a part-time county attorney.

In addition, it should be noted that Section 5 provides that the county attorneys who chose to be full time were to become full time on the first day of the 1975-1976 fiscal year. The apparent purpose was to allow the county commissioners to budget for the increased county attorney's salary. To require the successor to a part-time county attorney to become full time during a fiscal year could disrupt the county budgeting process. This reaffirms my conclusion. I note that you have not requested my opinion as to whether the successor could elect, with the consent of the county commissioners, to serve on a full time basis, and I withhold judgment on that question.

**THEREFORE, IT IS MY OPINION:**

The appointed or elected successor to a county attorney who chose, under Section 5, Chapter 102, Laws of 1975, to serve as a part-time county attorney, and who resigned before completing his term, may complete that term on a part-time basis.

Very truly yours,  
**ROBERT L. WOODAHL**  
Attorney General